# Goh Keat Poh & Ors v Farlim Properties Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS P-02–239 OF 2007, P-02–241 OF 2007 AND P-02–266 OF 2007
ABDULL HAMID EMBONG, HASAN LAH AND SULAIMAN DAUD JJCA
18 AUGUST 2009

*Civil Procedure — Estoppel — Res judicata — Effect of earlier decision of Federal Court — Wider concept of issue estoppel — Whether plaintiff estopped from claiming that defendants had agreed to sell their alleged spes successionis when it did not raise issue of spes successionis before Federal Court*

*Civil Procedure — Judicial precedent — Court of Appeal — Whether Court of Appeal bound by decision of Federal Court as to validity of agreements*

The three appeals which were the subject matter of this judgment concern various parcels of land in the Ayer Itam estate ('the lands'), which were registered in the name of Choong Lye Hock Estates Sdn Bhd (Choong estates). Choong estates held the land as trustees for the Estate of Chor Bah Say ('Chor's estate'). It held 1/4 of the undivided shares in the lands as the registered and beneficial proprietor and the remaining 3/4 of the undivided shares in the lands for Chor's estate. The first to sixth defendants were the beneficiaries of Chor's estate. Chor Phaik Har ('Phaik Har') and her sister, Chor Phaik Sim ('Phaik Sim') were the remaining direct beneficiaries of Chor's estate. The first to sixth defendants, Phaik Har and Phaik Sim, as beneficiaries of Chor's estate, and Choong Estates entered into two separate sale and purchase agreements with Farlim Properties Sdn Bhd ('the plaintiff') to sell their shares in the lands ('the Farlim agreements'). Although Phaik Har and Phaik Sim were named in both the Farlim agreements they did not execute both agreements because they did not agree with the purchase price. Despite this setback the plaintiff invoked a clause of both the Farlim agreements which allowed it to proceed with both agreements. Subsequently Phaik Har entered a caveat on the whole of the lands. The plaintiff then applied to the High Court for the removal of the caveat under s 327 of the National Land Code ('NLC') (*Chor Phaik Har*'s case). The High Court the plaintiff's application for the removal of the caveat on the grounds that the plaintiff was a person aggrieved by the entry of the caveat in respect of the lands. When Phaik Har appealed to the Federal Court, one of the issues that

was considered and decided by that court was whether a beneficiary under an intestacy had any interest in the property of a deceased person before the estate had been fully administered. The Federal Court held that until the estate had been fully administered by the administrators and distribution made according to law, the beneficiaries had no interest or property in Chor's estate so as to give them any title to the lands. Hence, the Federal Court held that in the circumstances the plaintiff was not a person aggrieved under s 327 of the NLC and the caveat was restored. Finally when the distribution and/or vesting order in respect of Chor's estate was made, Choong estates was allowed by the High Court to execute and deliver to the first to sixth defendants a valid and registrable transfer of the lands in proportion to their entitlement. The first to sixth defendants then gave notices to the plaintiff alleging that the latter had delayed completion and was in breach of the fundamental terms of the Farlim agreements and that if the breaches were not remedied the agreements would be terminated. The plaintiff denied being in breach and confirmed that it was ready and willing to complete the sale. Thereafter the first to sixth defendants proceeded to sell their interest in the lands to the seventh defendant. The plaintiff then commenced this action against the first to sixth defendants wherein it prayed, inter alia, for a declaration that the sale and purchase agreement that the first to sixth defendants had entered into with the seventh defendant was null and void, specific performance of the Farlim agreements and damages. Subsequently, the defendants filed an application to strike out the plaintiff's claim under O18 r 19 of the Rules of the High Court 1980 (the *Goh Keat Poh*'s case). The application which was dismissed by the deputy registrar was allowed on appeal by the High Court. The High Court struck out the plaintiff's claim on the grounds of, inter alia, res judicata and issue estoppel. Dissatisfied with the decision of the High Court, the plaintiff appealed to the Court of Appeal which allowed the plaintiff's appeal. After hearing the plaintiff's claim against the defendants the High Court held that the plaintiff had, on a balance of probability, proven its claim against the first to sixth defendants. The High Court also held that the seventh defendant was guilty of fraud when it conspired with the first to sixth defendants to deprive the plaintiff from enforcing its rights on the lands. This was the defendants' appeal against that decision by the High Court. At this appeal the parties agreed that should the court agree with the defendants' appeal in this case there would be no necessity to hear the other two appeals.

**Held**, allowing the appeal with costs here and court below:

(1) In *Chor Phaik Har*'s case when the Federal Court, had decided whether the plaintiff was a person aggrieved within the meaning of s 327 of the NLC, it had considered the validity of the Farlim agreements. When the Federal Court held that a beneficiary under an intestacy had no interest

A or property in the personal estate of a deceased person prior to the administration and distribution it meant that the first to sixth defendants as the beneficiaries had no interest in the lands to be able to give the plaintiff any title to the lands (see para 35).

B (2) The plaintiff's submission that the defendants had intended to sell their home to succeed the lands, ie their spes successionis, because Chor's Estate had yet to be administered and distributed could not stand. This was because in *Chor Phaik Har*'s case the Federal Court had made a finding that in the Farlim agreements the first to sixth defendants had C agreed to sell their rights, title and interest in the lands and not their spes successionis. In any case the term spes successionis was not used in the Farlim agreements. Further, applying the principles of res judicata or issue estoppel, which applied not only to the issues that the court was actually required to decide but also to every issue which the parties D exercising reasonable diligence might have raised at that time, the plaintiff was estopped from claiming that the defendants had agreed to sell their alleged spes successionis (see paras 36–37).

(3) The issue of the validity of the Farlim agreements had been conclusively E decided by the Federal Court in the *Chor Phaik Har*'s case. The decision of the court that the beneficiaries did have interest or property in the lands and could not have covenanted to convey any title to the plaintiff was binding on parties to Farlim agreements and anyone who sought to rely on the agreements to enforce their rights. It was also binding on F this court and every court in this country because of the doctrine of stare decisis (see paras 38–39).

**[Bahasa Malaysia summary**

G Ketiga-tiga rayuan yang menjadi perkara pokok penghakiman ini berkaitan pelbagai bidang tanah di Estet Ayer Itam ('tanah-tanah tersebut'), yang telah didaftarkan atas nama Choong Lye Hock Estates Sdn Bhd (Estet-estet Choong). Estet-estet Choong memegang tanah tersebut sebagai pemegang amanah untuk harta pusaka Chor Bah Say ('harta pusaka Chor'). Ia H memegang 1/4 daripada bahagian tidak dibahagikan dalam tanah-tanah tersebut untuk harta pusaka Chor. Defendan-defendan pertama hingga keenam merupakan benefisiari harta pusaka Chor. Chor Phaik Har ('Phaik Har') dan kakaknya, Chor Phaik Sim ('Phaik Sim') merupakan benefisiari secara langsung yang masih kekal dalam harta pusaka Chor. I Defendan-defendan pertama hingga keenam, Phaik Har dan Phaik Sim, sebagai benefisiari-benefisiari harta pusaka Chor, dan harta pusaka Choong telah memasuki dua perjanjian jual beli berasingan dengan Farlim Properties Sdn Bhd ('plaintif') untuk menjual bahagian-bahagian mereka dalam tanah-tanah tersebut ('perjanjian-perjanjian Farlim'). Meskipun Phaik Har

dan Phaik Sim dinamakan dalam kedua-dua perjanjian Farlim mereka tidak menyempurnakan kedua-dua perjanjian tersebut kerana mereka tidak bersetuju dengan harga belian. Meskipun halangan ini plaintif membangkitkan di dalam kedua-dua perjanjian Farlim yang membenarkannya meneruskan dengan kedua-dua perjanjian tersebut. Berikutan itu Phaik Har telah memasukan kaveat atas keseluruhan tanah-tanah tersebut. Plaintif kemudian telah memohon kepada Mahkamah Tinggi untuk pembatalan kaveat di bawah s 327 Kanun Tanah Negara ('KTN') (kes *Chor Phaik Har*). Mahkamah Tinggi telah membenarkan permohonan plaintif untuk pembatalan kaveat atas alasan-alasan bahawa plaintif merupakan seorang yang terkilan dengan kemasukan kaveat berkaitan tanah-tanah tersebut. Apabila Phaik Har merayu kepada Mahkamah Persekutuan, salah satu isu yang perlu dipertimbangkan dan diputuskan oleh mahkamah tersebut adalah sama ada benefisiari dalam kematian tak berwasiat mempunyai apa-apa kepentingan dalam hartanah si mati sebelum harta pusaka tersebut ditadbirkan. Mahkamah Persekutuan memutuskan bahawa sehingga harta pusaka ditadbirkan sepenuhnya oleh pentadbir-pentadbir dan pembahagian dibuat menurut undang-undang, benefisiari-benefisiari tiada kepentingan atau harta dalam harta pusaka Chor untuk memberikan mereka apa-apa hak milik ke atas tanah-tanah tersebut. Justeru itu, Mahkamah Persekutuan memutuskan bahawa dalam keadaan berikut plaintif bukan seorang yang terkilan di bawah s 327 KTN dan kaveat dikekalkan. Akhirnya apabila pembahagian dan/atau perintah pemberian berkaitan harta pusaka Chor dibuat, harta pusaka Choong dibenarkan oleh Mahkamah Tinggi untuk menyempurnakan dan menyerahkan kepada defendan-defendan pertama hingga keenam pemindahan sah dan boleh didaftarkan tanah-tanah tersebut mengikut hak pembahagian mereka. Defendan-defendan pertama hingga keenam kemudian memberikan notis-notis kepada plaintif mengatakan bahawa plaintif telah melengahkan penyempurnaan dan melanggar terma-terma penting perjanjian-perjanjian Farlim dan bahawa jika pelanggaran-pelanggaran tersebut tidak diremedi perjanjian-perjanjian tersebut akan ditamatkan. Plaintif menafikan telah membuat pelanggaran dan mengesahkan bahawa ia bersedia dan ingin menyempurnakan jualan tersebut. Berikutan itu defendan-defendan pertama hingga keenam terus menjual kepentingan mereka dalam tanah-tanah tersebut kepada defendan ketujuh. Plaintif kemudian telah memulakan tindakan ini terhadap defendan-defendan pertama hingga keenam di mana ia memohon, antara lain, untuk deklarasi bahawa perjanjian jual beli yang ditandatangani oleh defendan-defendan pertama hingga keenam dengan defendan ketujuh adalah terbatal dan tidak sah, pelaksanaan spesifik perjanjian-perjanjian Farlim dan ganti rugi. Berikutan itu, defendan-defendan telah memfailkan permohonan untuk membatalkan tuntutan plaintif di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 (kes *Goh Keat Poh*). Permohonan ini yang ditolak oleh timbalan pendaftar telah dirayu dan dibenarkan oleh Mahkamah Tinggi. Mahkamah

Tinggi telah membatalkan tuntutan plaintif atas alasan-alasan, antara lain, res judicata dan isu estopel. Berasa tidak puas hati dengan keputusan Mahkamah Tinggi, plaintif merayu ke Mahkamah Rayuan yang membenarkan rayuan plaintif. Selepas perbicaraan tuntutan plaintif terhadap defendan-defendan, Mahkamah Tinggi memutuskan bahawa plaintif telah, atas imbangan kebarangkalian, membuktikan tuntutannya terhadap defendan-defendan pertama hingga keenam. Mahkamah Tinggi juga memutuskan bahawa defendan ketujuh bersalah atas raud apabila bersubahat dengan defendan-defendan pertama hingga keenam untuk menafikan plaintif daripada menguatkuasakan haknya ke atas tanah-tanah tersebut. Ini adalah rayuan defendan-defendan terhadap keputusan tersebut oleh Mahkamah Tinggi. Dalam rayuan ini pihak-pihak bersetuju bahawa sekiranya mahkamah bersetuju dengan rayuan defendan-defendan dalam kes ini tiada keperluan untuk mendengar dua rayuan lain.

**Diputuskan**, membenarkan rayuan dengan kos di mahkamah ini dan Mahkamah Tinggi:

(1) Dalam kes *Chor Phaik Har* apabila Mahkamah Persekutuan memutuskan sama ada plaintif merupakan seorang yang terkilan dalam maksud s 327 KTN, ia telah mempertimbangkan kesahan perjanjian-perjanjian Farlim tersebut. Apabila Mahkamah Persekutuan memutuskan bahawa benefisiari dalam kematian tak berwasiat tiada kepentingan atau harta dalam harta pusaka peribadi si mati sehingga pentadbiran dan pengagihan ia bermaksud bahawa defendan-defendan pertama hingga keenam sebagai benefisiari-benefisiari tiada kepentingan dalam tanah-tanah tersebut untuk membolehkan plaintif diberikan apa-apa hak milik ke atas tanah-tanah tersebut (lihat perenggan 35).

(2) Hujahan plaintif bahawa defendan-defendan berniat untuk menjual rumah mereka untuk mendapatkan tanah-tanah tersebut, iaitu *spes successionis* mereka, oleh sebab harta pusaka Chor masih belum ditadbirkan dan diagihkan, tidak boleh kekal. Ini adalah kerana dalam kes *Chor Phaik Har* Mahkamah Persekutuan telah membuat penemuan bahawa dalam perjanjian-perjanjian Farlim defendan-defendan pertama hingga keenam telah bersetuju untuk menjual hak, milikan dan kepentingan mereka dalam tanah-tanah tersebut dan bukan spes successionis mereka. Walau bagaimanapun terma *spes successionis* tidak boleh digunakan dalam perjanjian-perjanjian Farlim. Bahkan, dengan menggunakan prinsip-prinsip res judicata atau isu estopel, yang terpakai bukan hanya untuk isu-isu yang mahkamah perlu memutuskan tetapi juga untuk setiap isu yang mana pihak-pihak menggunakan usaha wajar mereka yang mungkin timbul pada masa

tersebut, plaintif diestopkan daripada mendakwa bahawa defendan-defendan telah bersetuju untuk menjual *spes successionis* yang dikatakan mereka (lihat perenggan 36–37).

(3) Isu kesahan perjanjian-perjanjian Farlim telah diputuskan secara muktamad oleh Mahkamah Persekutuan dalam kes *Chor Phaik Har*. Keputusan mahkamah tersebut bahawa benefisiari-benefisiari mempunyai kepentingan atau harta dalam tanah-tanah tersebut dan tidak mungkin dikatakan menyerahkan apa-apa hak milik kepada plaintif yang mengikat pihak-pihak kepada perjanjian-perjanjian Farlim dan sesiapa yang ingin bergantung kepada perjanjian-perjanjian untuk menguatkuasakan hak-hak mereka. Ia juga mengikat ke atas mahkamah ini dan setiap mahkamah dalam negara ini kerana doktrin stare decisis (lihat perenggan 38–39).]

**Notes**

For cases on Court of Appeal, see 2(1) *Mallal's Digest* (4th Ed, Reissue 2007) paras 4291–4300.

For cases on effect of earlier decision of Federal Court, see 2(1) *Mallal's Digest* (4th Ed, Reissue 2007) paras 2630–2642.

**Cases referred to**

*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189, SC (refd)

*Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188, FC (folld)

*Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals* [2003] 4 MLJ 654; [2003] 4 CLJ 505, CA (refd)

**Legislation referred to**

National Land Code s 327

Rules of the High Court 1980 O 18 r 19

**Appeal from**: Civil Suit Nos 22–307 of 1996 (MT-2) and 22–307 of 1996 (High Court, Pulau Pinang)

*Harpal Singh Grewal (Teh Boon Eng, Gurubachan Singh and K Kirubakaran with him) (Kiru & Yong) for the appellants (Civil Appeal No P-02–239 of 2007).*

*Joseph Yeo (Ranjit Singh and Tan Hiang Joo with him) (Ng & Anuar) for the appellants (Civil Appeal No P-02–241 of 2007).*

*Mureli Navaratnam (Mureli Navaratnam) for the appellants (Civil Appeal No P-02–266 of 2007).*

*DP Vijandran (Mahinder Singh Dulku, VM Mohan and Abdul Fareed bin Gafoor with him) (Mahinder Singh Dulku & Co) for the respondent.*

**Hasan Lah JCA (delivering judgement of the court):**

INTRODUCTION

**[1]** These three appeals were fixed before us on 11 May 2009. The parties agreed that all the three appeals be heard together and for the purpose of the Appeal Case No 239 would be heard first and should the court agree with the appellant's appeal in this case there would be no necessity to hear the other two appeals. In Case No 241, the appellant is the seventh defendant whereas in Case No 266 the appellant is the third defendant.

**[2]** On 15 May 2009 we unanimously allowed the appeals. We now give the grounds of our decision.

**[3]** In this judgment the parties are referred to in their respective capacities in the High Court.

THE BACKGROUND FACTS

**[4]** This case concerns various parcels of land commonly known as the Ayer Itam Estate, particularly described in schedule 1 annexed to the re-amended statement of claim ('the said lands').

**[5]** The said lands were at all material times registered in the name of Choong Lye Hock Estates Sdn Bhd. ('Choong Lye Hock') who held the said lands as trustees for the estate of Chor Bah Say @ Chor Bar Say, deceased ('the estate of Chor Bah Say') as to the 3/4 undivided shares in the said lands and, as registered and beneficial proprietor as to the remaining 1/4 undivided shares in the said lands.

**[6]** The estate of Chor Bah Say was survived by the estate of Chor Sin Kheng, the estate of Chor Paik Guor, the estate of Chor Sin Tee, the estate of Chor Phaik See, the estate of Chor Phaik Suan, the estate of Oh Kee Lee ('these beneficiaries'), who are the first, second, fourth, fifth and sixth defendants, in the High Court and the appellant in Case No 239 and also the estate of Chor Phaik Hor and the estate of Chor Phaik Sim.

**[7]** The said Chor Bah Say @ Chor Bar Say, deceased, died intestate.

**[8]** By two sale and purchase agreements dated 23 January 1992 entered into by these beneficiaries and Choong Lye Hock as the vendors, and the plaintiff as the purchasers, these beneficiaries and Choong Lye Hock sold

their respective undivided shares to the plaintif ('the Farlim agreements'). Both the Farlim agreements are almost identical. A

**[9]** The remaining two beneficiaries of the estate of Chor Bah Say, Chor Phaik Har and Chor Phaik Sim were named in both the Farlim agreements but they did not execute both the Farlim agreements as they did not agree to the sale of the said lands to the plaintiff. B

**[10]** The plaintiff had by their letter dated 23 January 1992 invoked cll 23 of both the Farlim agreements and elected to proceed with both the Farlim agreements notwithstanding that the said Chor Phaik Har and Chor Phaik Sim did not sign both the Farlim agreements. C

**[11]** Subsequent to the execution of the Farlim agreements the plaintiff was notified that Chor Phaik Har had lodged a private caveat against Lot Nos 1457 and 1835 on 26 October 1991. The plaintiff applied to set aside the said caveat on 17 March 1992 vide Originating Summons No 24–201 of 1992. On 18 June 1993 the Penang High Court ordered the removal of the private caveat but it was restored by the Federal Court on 5 July 1997. D

**[12]** On 2 March 1993 the plaintiff applied for the approval of the FIC for the purchase of the said lands and the approval was given on 25 August 1992. E

**[13]** Application for distribution and/or vesting order of the estate of Chor Bah Say was filed on 12 April 1994 vide Originating Summons No 24–326 of 1994 by Choong Lye Hock and four defendants. It was allowed by the High Court on 19 May 1995 and it was ordered that Choong Lye Hock be at liberty to execute and deliver to the first to sixth defendant a valid and registrable transfer of the said land in proportion to their undivided entitlement. F G

**[14]** The first to the sxith defendants gave notices to the plaintiff between the months of January to April 1995 stating that the plaintiff had failed to take steps to complete the transaction, delayed the completion and thereby was in breach of the fundamental terms of both the Farlim agreements. They gave the plaintiff one month to remedy the breaches, failing which the Farlim agreements would be regarded as terminated. H

**[15]** The plaintiff replied to the said notices and denied that it was in breach of the Farlim agreements as alleged. The plaintiff confirmed that they were ready and willing to complete the sale. I

**[16]** The first, second, third, fourth and sixth defendants proceeded to sell their interests in the said lands to the seventh defendant in the months of February and March 1995. The sale was completed by the transfer of their respective interests in the said lands to the seventh defendant.

**[17]** The plaintiff then commenced this action against all the defendants on or about 27 September 1996. The plaintiff sought the following reliefs against them:

(a) a declaration that the respective notices of termination issued by the first to the sixth defendants are null and void and of no legal effect and that the Farlim agreements are valid in law and still subsisting;

(b) a declaration that the sale and purchase agreements between the first to the sixth defendants as vendors of their respective undivided shares in the said lands and the seventh defendant as purchaser and the subsequent transfers thereof to the seventh defendant are null and void and of no effect in law;

(c) specific performance of the Farlim agreements;

(d) damages; and

(e) specific performance against the seventh defendant.

**[18]** The defendants then filed an application under O 18 r 19 of the Rules of the High Court 1980 to strike out the plaintiff's claim. The application was dismissed by the learned deputy registrar. On appeal to the judge in chamber by the defendants the High Court judge allowed the appeal. The plaintiff then appealed to this court against the decision and the plaintiff's appeal was allowed by this court. The judgment of this court was reported in *Farlim Properties Sdn Bhd v Goh Keat Poh & Ors and other appeals* [2003] 4 MLJ 654; [2003] 4 CLJ 505 ('the *Goh Keat Poh*'s case').

DECISION OF THE HIGH COURT

**[19]** After a full trial in the High Court the learned High Court judge held that the plaintiff had, on the balance of probability, proven its case against the first to the sixth defendants and he accordingly allowed the plaintiff's claim as prayed with costs.

**[20]** With regard to the plaintiff's claim against the seventh defendant the learned High Court judge held that the seventh defendant was guilty of fraud when it conspired with the first to the sixth defendants to deprive the plaintiff from enforcing its rights on the said lands. As such the seventh defendant did not obtain an indefeasible title to the said lands.

**[21]** One of the issues argued and decided in the High Court was whether both the Farlim agreements were valid and subsisting. Under this issue the learned High Court judge had to decide whether res judicata was applicable to the case in respect of the decision of the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188 ('the *Chor Phaik Har*'s case'). The learned High Court judge held that res judicata did not apply and he relied on the judgment of this court in the *Goh Keat Poh*'s case.

**[22]** The learned High Court judge also held that the Farlim agreements are valid and subsisting and enforceable. At p 175 of the appeal record the learned High Court judge gave the following reason:

> Therefore it is my considered view that at the time the agreements were entered the first to sixth defendants had intended to sell all their rights, title and interest in their respective shares and their hope to succeed in the said land (spes successionis). Because at that time the administration of the estate of Chor Bar Say had not been completed, what they actually sold was their spes successionis.

Further, at p 188 of the appeal record the learned High Court judge concluded that:

> As a conclusion I find although the first to sixth defendants may not have good title and interest in the said land at the time both Farlim agreements were entered nevertheless in equity the agreements are good. The defendants had received valuable considerations in the form of various payments, solicitors' fees and cost. They cannot subsequently claim the agreements entered are not valid. The agreements are enforceable against them when they are vested with the title and interest in the said land ...

THE ISSUES RAISED IN THIS APPEAL

**[23]** The preliminary issues of law argued before us at the outset of the hearing of these appeals are the issues of res judicata and stare decisis. Learned counsel for the defendants submitted that the learned High Court judge erred when he found that the validity of both the Farlim agreements and their enforceability was not res judicata as having been decided by the Federal Court in the *Chor Phaik Har*'s case. The defendant also raised the issue of stare decisis and submitted that the learned High Court judge was bound by the decision in the *Chor Phaik Har*'s case.

**[24]** Learned counsel for the defendants further submitted that based on the principles of res judicata/issue estoppel the plaintiff was estopped from claiming that the first to sixth defendants had agreed to sell their 'alleged spes successionis'. In the *Chor Phaik Har*'s case the Federal Court had decided that in the Farlim agreements the beneficiaries have agreed to sell their rights, title and interest of their respective shares in the said lands.

**[25]** In response to that learned counsel for the plaintiff referred to the decision of this court in the *Goh Keat Poh*'s case where this court had considered the issue of res judicata by reason of the Federal Court's decision in the *Chor Phaik Har*'s case. In that case this court held that the plea of res judicata was inapplicable. Leave to appeal against that decision was refused by the Federal Court. The plaintiff also contended that the defendants could not relitigate the same issue that was determined by a previous coram of this court as it amounted to an abuse of process.

**[26]** Since the arguments on this issue are related to the judgments in the *Chor Phaik Har*'s case and the *Goh Keat Poh*'s case it is therefore necessary to take a closer look at the two judgments.

THE *CHOR PHAIK HAR*'S CASE

**[27]** We would first deal with the judgment of the Federal Court in the *Chor Phaik Har*'s case. As stated earlier the estate of Chor Bah Say held 75% of the said lands. Chor Phaik Har and her sister, Chor Phaik Sim were the remaining direct beneficiaries of the estate of Chor Bah Say. They were parties to the Farlim agreements but later they refused to execute the agreements on the ground that they did not agree on the price. Chor Phaik Har also alleged that the purported sale contravened the 1943 agreement. Hence, on 26 October 1991, Chor Phaik Har entered a caveat caveating the whole of the said lands. On 17 March 1992 the respondent, Farlim Properties Sdn Bhd (who is the plaintiff in the instant case) applied to the High Court for the removal of the caveat under s 327of the National Land Code.

**[28]** The High Court judge granted Farlim's application for the removal of the caveat on the ground that Farlim was a person aggrieved by the entry of the caveat in respect of the said lands. Chor Phaik Har then appealed to the Federal Court against the said decision.

**[29]** The Federal Court allowed the appeal and the caveat was restored. One of the issues considered and decided by the Federal Court in that case was whether a beneficiary under an intestacy has any interest in the property of a deceased person until the estate has been fully administered. The Federal Court after referring to the textbook on *The Law and Practice of Intestate Succession* by CH Sherrin and a passage in *Executors, Administrators and Probate* (17th Ed, 1993) by Williams, Mortimer and Sunnecks, opined that:

> based on the above commentaries, founded no doubt on the analogous principle of law concerning testate succession, it is our conclusion that in law, a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

**[30]** The Federal Court then went on to decide whether the estate of Chor Bah Say had been fully administered at the time of the execution of the Farlim agreements. In the process the Federal Court examined some of the clauses of the Farlim agreements, namely the relevant preambles to the agreements, and made the following observation:

> From the above clauses, it is envisaged that the beneficiaries are entitled to the beneficial ownership of the 3/4 undivided share of the estate of Chor Bah Say in the Ayer Itam estate and that they have agreed to sell their rights title and interest of their respective shares in the lands which formed part of the Ayer Itam estate to the respondents as set out in the schedule thereto.

**[31]** On the main issue the Federal Court held at p 197 that:

> Having regard to the above observation and the circumstances of the whole case, we are satisfied that at the date of the execution of the sale agreements, the administration of the estate of Chor Bah Say has not been completed. It follows that until his estate has been fully administered by the administrators and distribution made according to law, the beneficiaries have no interest or property in the estate of Chor Bah Say so as to give them any title to the lands. Here, we agree with counsel for the appellant that the beneficiaries of his estate, being vendors of the lands under the sale agreements could not have covenanted to convey any title to the respondents. In the result, the respondents cannot rely on the sale agreements to justify their status as 'person aggrieved' under s 327 of the Code ...

THE *GOH KEAT POH*'S CASE

**[32]** The defendants in the instant case applied for the striking out of the plaintiff's action under O 18 r 19 of the Rules of the High Court. The defendants' application was dismissed by the learned assistant registrar. The defendants then appealed to the judge in chambers against the decision. The defendants' appeal was allowed by the High Court judge. The High Court judge struck out the plaintiff's claim on the ground of, inter alia, res judicata and issue estoppel.

**[33]** Dissatisfied with the decision of the High Court judge the plaintiff then appealed to this court against the decision. This court then allowed the plaintiff's appeal. On the issue of res judicata this court, through Mohd Noor Ahmad JCA (as he then was) said at p 666 (MLJ); p 516 (CLJ):

> To us, it is indeed clear from the judgment in *Chor Phaik Har v Farlim Properties Sdn Bhd*, that the Federal Court did not at all consider on the validity of the 1992 agreements. The issue was only raised by learned counsel for the appellant in the case in his submission before the court. However, the court merely held that as the administration of the deceased's estate was not completed at that point of time the

beneficiaries had no title to pass to the plaintiff and as such, the plaintiff was not 'a person or body aggrieved' for the purpose of removal of the private caveat. Whatever it is, res judicata can never be applied in favour of the defendants because res judicata only prohibits a cause of action from being re-litigated between the same parties but in that case the defendants were never a party.

**[34]** The administration of the estate of Chor Bah Say was completed sometime in 1995 after distribution order was obtained from the High Court on 19 May 1995. That was the position when the appeal came before the High Court judge. On the issue of the validity of the Farlim agreements this court then made the following observation at pp 667 – 668 (MLJ); p 518 (CLJ):

> What is discernible from the authorities is that a beneficiary to a deceased's estate can enter into a contract of sale of land involving a subject matter which is not subsisting in the sense that the land is still in the deceased's name. However, when the beneficiary comes to be in a position to pass on the title to the purchaser he can be compelled by the purchaser to make good the contract out of that interest. Although in the present appeal, cl 1.1of the relevant 1992 agreements states that the sale is in respect all the rights, title and interest and shares of all the beneficiaries in the said lands, to our mind, having regard to the fact that the administration of the deceased's estate had not been completed at the time of its execution, the subject matter involved in the transaction is none other than the sale of spec successionis. As specific performance of the 1992 agreements as prayed for by the plaintiff in the action is an equitable relief the court will look at the substance rather than the form. Anyway, it is still open to the plaintiff to amend its pleading to cover this point, if it so wishes, before the trial of the action.

DECISION OF THIS COURT

**[35]** We have carefully considered the judgment of the Federal Court in the *Chor Phaik Har*'s case and we are satisfied that the Federal Court, in deciding the issue whether Farlim was a person aggrieved within the meaning of s 327 of the National Land Code, did consider the issue of the validity of the Farlim agreements. The Federal Court clearly and unequivocally held that in the agreements the beneficiaries had agreed to sell their rights title and interest of their respective shares in the said lands. The Federal Court also held that in law a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the deceased's estate is complete and distribution made according to the law of distribution of the intestate estate. As such the beneficiaries of the estate of Chor Bah Say had no interest or property in the estate of Chor Bah Say so as to give them any title to the land. The beneficiaries could not therefore have covenanted to convery any title to the plaintiff.

**[36]** We are unable to agree with the contention that the subject matter of the Farlim agreements was the spes successionis the defendant had in the said lands for the simple reason that the Federal Court has made a finding that in the Farlim agreements the beneficiaries have agreed to sell their rights title and interest of their respective shares in the said lands. Furthermore the term 'spes successionis' was never mentioned in the Farlim agreements. As such the question of disposing a spes successionis did not arise. The plaintiff did not raise the issue of spes successionis before the Federal Court. The plaintiff must abide by the decision as res judicata applies not only to issues the court was actually required to decide but also to every issue which the parties exercising reasonable diligence might have raised at that time (*Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189).

**[37]** Applying the principles of res judicata/issue estoppel the plaintiff was therefore estopped from claiming that the defendants had agreed to sell their 'alleged spes successionis'. As such we are of the view that the learned High Court judge has erred in coming to the decision that what the first to sixth defendants had intended to sell was their spes successionis.

**[38]** We are also of the view that the issue of the validity of the Farlim agreements has been conclusively decided by the Federal Court in the *Chor Phaik Har*'s case when it held that the beneficiaries did not have interest or property in the estate of Chor Bah Say and they could not have covenanted to convey any title to the plaintiff. The decision of the Federal Court is binding on the parties to the Farlim agreements and anyone who seeks to rely on them to enforce their rights. It is to be noted that the plaintiff in the instant case was also the plaintiff in that case. On this issue we would refer to the observation made by Peh Swee Chin FCJ in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* where the learned judge, after considering a host of authorities on the doctrine of res judicata, stated:

> On the other hand, issue estoppel literally means simply an issue which a party is estopped from raising in a subsequent proceeding. However, issue estoppel, in a nutshell, from a consideration of case law, means in law a lot more ie that neither of the same parties or their privies in a subsequent proceeding is entitled to challenge the correctness of the decision of a previous final judgment in which they, or their privies, were parties. This sounds like explaining a truism, but it is the corollary from that statement that is all important and that could have given birth to the controversies alluded to above, the corollary being that neither of such parties will be allowed to adduce evidence or advance any argument to contradict such decision ... It is important to bear in mind the manner in which issue estoppel operates in preventing such contradiction of the previous judgment.
>
> There is one school of thought that issue estoppel applies only to issue actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary

A view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata ie doctrine of estoppel per rem judicatum.

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of
B issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel per rem judicatum. It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the
C increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

D **[39]** The decision of the Federal Court is binding on this court and every court in this country. It is our decision that we are bound by stare decisis to follow it. Similarly the High Court is obliged to apply the law as stated by the Federal Court in the *Chor Phaik Har*'s case.

E **[40]** For the reasons stated above we allowed the appeal with costs here and below and the decision of the learned High Court judge was set aside.

*Appeal allowed with costs here and court below.*

F Reported by Kohila Nesan

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